

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
Employee

- *claimant*

CASE NO.  
UD274/2008  
RP218/2008  
MN254/2008  
WT137/2008

against

Employer

- *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**  
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**  
**ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

Members: Mr. J. Hennessy  
Mr. T. Kennelly

heard these claims at Clonmel on 26th September 2008  
and 6th January 2009

Representation:

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Claimant(s) : Mr. Dermot Cahill BL instructed by John Shee & Company, Solicitors, 28 Parnell Street, Clonmel, Co. Tipperary

Respondent(s) : Mr. Barry Walsh, A & L Goodbody, Solicitors, I.F.S.C., North Wall Quay, Dublin 1

The determination of the Tribunal was as follows:-

At the outset the claim under the Redundancy Payments Acts, 1967 to 2003 was withdrawn on the first day of the hearing.

**Claimant's Case:**

The claimant gave evidence. He was employed by the respondent from January 29 1999 to November 13 2007. In August 2005 the company was reconstructed and his job title was changed to that of grocery sales executive. He explained that he had been advised to apply for the position.

In 2007 there were two vacancies available. The first as a national field sales manager and the second as a national accounts manager for a major customer (DS). They were not advertised internally which upset him as he felt he was qualified for either position and was the most experienced in the grocery section. He spoke twice to the head of grocery (JM) about the vacancies and was told that JM did not think the claimant was interested. He also felt the claimant was not experienced enough for the positions.

On 28 August 2007 he attended a meeting in Dublin with JM as he wanted clarity where he stood with the respondent company and what options were open to him. He asked what his role was in the company. JM told him that he was not sure and did not know what other roles were out there for him. He expected to be told there were other opportunities for him. He felt he was not encouraged to remain with the respondent. In the end he felt his time with the respondent was coming to an end. He explained that it was a “rash” conversation but it was agreed that day. However he did say he would give three or six months notice. The date of 26 October 2007 was agreed. He said that he did not take this as handing in his notice. He hoped that if the respondent valued him they would offer him some prospects.

On 31 October 2007 he received a letter from HR explaining the steps needed to be taken before his exit meeting, a Notice of Resignation was also enclosed for him to complete and submit. The claimant told the Tribunal that he felt all was lost. He signed the form two days later having received a call from JM enquiring if he had signed it but did not post it. On 4 November 2007 he emailed HR to tender his resignation. The following evening he posted the Notice of Resignation.

On 5 November 2007 he emailed HR at 11.36pm to retract his resignation as he felt he had made a rash decision. On 7 November 2007 he faxed the company again retracting his resignation stating he had done it under stress.

On 8 or 9 November 2007 redundancies were announced in the company. The role of grocery sales executive had become obsolete with other roles being restructured and felt he should have the opportunity as he was still working for the company. On 8 November 2007 he received an email from the HR manager (BMC) stating the company had accepted his verbal resignation in August which was backed up by his written resignation. He was told that the following day would be his last day. He was very surprised his retraction had not been accepted. He was very upset and took legal advice.

On 13 November 2007 he went to work and made a few calls. He met the person who was covering the Clonmel area. This person had received a call to cover the claimant’s area which he could not understand and his role had been made redundant. He finished work on November 13 2007. He gave evidence of loss.

On cross-examination he said had told JM that he wanted to travel but had asked what his progression was within the company. JM told him it would be a good thing to travel. When asked he agreed that he had verbally resigned in August. He said that he did not remember seeing the advertisement for his position three days after he had resigned. When put to him that he had spoken to one of the old area manager (DN) about the matter. He agreed that he and JM had discussed a leaving date of 26 October 2007 but he had worked beyond that date. He agreed that he had been asked a few times by JM for his resignation in writing. He said that he had submitted his resignation under duress and felt he was not a valued member of staff. He said that he did not retract his resignation to avail of the redundancy package, he wanted to continue working.

On re-direction he stated that he had not been informed of a grievance procedure.

At the beginning of the 6 January hearing the respondent's representative stated that 15 August 2007 on the respondent's notice of appearance should read 28 August 2007. He submitted that, as this was not a dismissal case and the fact of dismissal was in dispute, the burden of proof was on the claimant. He put it to the Tribunal that the claimant had not made out a case to discharge the burden of proof.

The claimant's representative countered that there had been a ruling at the previous Tribunal hearing that the Tribunal would proceed to hear all the evidence.

The Tribunal announced that it continued to wish to hear all the evidence.

The respondent's representative stated that he did not know what the claimant's case was.

### **Respondent's Case**

Giving sworn testimony, a witness (JM) for the respondent said that he had been eight years with the respondent in a sales manager role. (He had previously worked with other companies.) JM was head of grocery sales for the respondent. The claimant reported to a field sales manager (FOB) who reported to JM. The claimant was a very good employee of the respondent and had a good career with the respondent. The claimant serviced a major customer (DS) for the respondent. The claimant was eight to nine years with the respondent. The claimant made a number of applications for management posts over the years. JM encouraged the claimant to better himself but the claimant did not succeed in getting roles for which he applied.

Following the retirement of a respondent executive (DN) there was a vacancy for a sales manager. It was unusual that there were three sales manager roles open. The claimant's application did not get through screening. JM got the claimant to interview but the claimant did not succeed.

Respondent vacancies would be advertised but the DN post was not advertised. The claimant brought no grievance to JM. FOB was moving sideways and FOB's role was advertised.

On 28 August 2007 the claimant was in Dublin at a meeting. The claimant had rung on that day and had asked to talk to JM. The claimant verbally resigned.

The claimant said he was handing in his notice and taking a break from Ireland to travel for four to six months. His girlfriend would not be able to take all that time. The claimant said he intended to sell his investment package and start afresh after that. The claimant had no firm plans.

The claimant was very frank and very calm. JM knew about the claimant's applications for promotion and knew that the claimant had given very good service. The claimant said that he was making the right decision. The claimant was not stressed or under duress. They "chatted for a good half-hour" after the claimant's resignation. The claimant reassured JM that the claimant was making the right decision for himself. The claimant was quite open on the day that he had resigned.

The claimant indicated that he would stay working until after the October Bank Holiday. That would take him to twelve weeks' notice. He was to end on the October weekend. JM told him that he would need to send in a letter of resignation but the claimant did not do so.

On 25 or 26 October the claimant asked to keep his company car a bit longer. JM told him that he could keep it a few weeks extra.

It was put to JM that, on the previous Tribunal hearing day, the claimant had not accepted that he had resigned. JM replied: "I refute that. We had everything in order for his departure."

JM told the Tribunal that on 3 September the respondent had advertised for a replacement for the claimant and that "extensive efforts" were, in fact, made to replace the claimant and that everything was in place for the claimant to be replaced on 12 November 2007. There was to be a two-day handover to another man (AF) on 8 and 9 November 2007. The claimant extended his notice by two weeks to let the respondent move AF down to the southeast. The claimant was very accommodating about this.

The claimant gave no indication of having second thoughts. He never expressed any doubts nor approached JM with any problem.

On 6 November 2007 JM attended a meeting in Portlaoise about restructuring in the respondent and the implications of this. On 15 October JM had become aware of this. This was about two months after the claimant's resignation.

The claimant was not at the meeting on Tuesday 6 November 2007. The claimant was due to finish on the Friday. JM rang the claimant at about 9.30 on 7 November. Out of courtesy he told the claimant of the restructuring and what was happening. The claimant asked JM if he had lost out on a potential redundancy. JM replied that it was "a moot point" because the claimant was to finish on Friday 9 November.

On 12 and 13 November the claimant went to work as if he had not resigned. The claimant called to outlets on 12 and 13 November. The respondent moved in a cash-and-carry person (EB). EB had been commercially supplying for the respondent in Dungarvan and outlets on 12 and 13 November.

JM was shocked at the claimant turning up. He rang the claimant and asked him to stop. The claimant said that he would keep doing it. JM said that he (the claimant) could not do so and that the respondent had two people doing the same sales call in Dungarvan.

Under cross-examination, JM accepted that the first reference to redundancy had been in mid-October but said that it had been known of a few weeks before that. He added that there had been no redundancies in the respondent's previous restructuring.

JM acknowledged that the claimant had been looking to "move on" within the respondent, that the claimant had been "one of our top salespeople" and that he had sought roles but said that "stronger people" got the jobs. Asked why not tell the claimant about the redundancy, JM replied: "Why would I? He had resigned."

It was put to JM that about mid-September he knew that the claimant could get a new post (in a restructuring). JM replied: "He had resigned. There was no need to say more to him. Once somebody makes up his mind to resign I won't try to persuade him to change his mind."

When it was put to JM that the claimant had travelled to the meeting to discuss his future, JM

replied that the claimant had spoken by resigning and added: "I told him that this was only the second time in my career when somebody resigned before I could say anything."

Further pressed that the claimant had gone in to discuss his future, JM replied: "He phoned and arranged to meet me. He did it back-to-front because he resigned first." JM added that the claimant had said that he wanted to have a chat but had acted by resigning.

Invited to agree that he had told the claimant that the claimant had no future in the respondent, JM replied: "I refute that."

Asked to agree that he had left the claimant with no option but to resign, JM said: "I reject that I cajoled him into resigning."

JM acknowledged that the respondent had placed an advertisement saying that the respondent moved quickly and adding: "Within five days we had an ad out. I made sure he was making his decision in a cool, calm and collected manner. I don't doubt that he could have applied for a business development manager role. There's no guarantee that he would have got one."

Asked what was the respondent's procedure for somebody who resigns, JM said that there was a conversation with the employee to ensure that the resignation was well thought through, that then there was a written resignation and that the claimant's role had been advertised.

Asked why a written resignation was needed and when was it final, JM replied that the respondent accepted a verbal one first and that, when a written resignation came through, it was filed.

JM was now referred to the respondent's notice of appearance and it was put to him that a resignation was not final until a form was completed. JM replied that, once the claimant told of his resignation, JM talked through it and reassured himself that he could be satisfied that the claimant had thought it through. Stating that the resignation had been given verbally, JM did acknowledge, "he was slow in sending in his resignation".

JM was now referred to the respondent's "Notice of Resignation" for "Sales Executives and Display Developers" which read: "Please consider your decision to resign carefully before signing, as this notice is final". JM replied by referring to e-mail and letter correspondence and saying that he had accepted the claimant's verbal resignation on 28 August. JM did not accept that he had a different view of resignation from that of the respondent's HR but said "salespeople are not great at admin".

When it was put to JM that he had wanted the claimant "out the door" before there could be redundancies he replied: "I refute that."

Asked if he had ever talked to the claimant to tell him that he could "move on" (within the respondent), JM replied that there had been no talk of redundancies at the time of the claimant's resignation. JM added: "I reminded him that he had still not sent in his resignation. We move quickly to advertise."

JM now told the Tribunal that the abovementioned AF had approached him about a move to the southeast. AF did this within a few days of the advertisement. AF "was due to go down for a two-day handover" on 8 and 9 November.

Asked if AF was only “going down” on a temporary basis, JM disagreed saying that the respondent paid for rent for AF. However, the respondent used a Carlow-resident employee (EB) and refunded money to AF. EB stayed until the restructuring took effect. The respondent wanted to defer the AF move and then decided it was more prudent not to move AF down.

JM told the Tribunal that about fourteen business development manager posts were created after restructuring and that the claimant could have applied but that there was no guarantee of success. JM said that the respondent’s concern was with employees who wanted to stay with the respondent and that the claimant had not been entitled to redundancy because he had resigned. JM did acknowledge that the claimant could have got redundancy if he had stayed.

JM stated to the Tribunal that the claimant’s e-mail rescinding his resignation came late (23.36) on Tuesday 6 November and that he had wanted to tell the claimant, “as a courtesy” of the restructuring.

Questioned by the Tribunal, JM said that he did not know how many employees were made redundant and that it had been a restructuring of the salesforce as opposed to a restructuring of all the respondent employees but that only on 15 October 2007 was it learned that there would be redundancies. JM said that he did not know of this on 28 August and only knew of it in mid-September. Asked when does a resignation come into effect, JM replied that a “written one is an administrative matter”.

Giving sworn testimony, a respondent witness (BMC) said that he had worked in HR for thirteen years, seven of which were with the respondent. In 2007 there were three vacancies at management level. The claimant applied and was one of twenty-one people seeking the three posts which were advertised. The claimant was notified by e-mail but was not ultimately successful. In late August 2007 BMC was told that the claimant had resigned.

BMC told the Tribunal that he would consider a verbal resignation to be a resignation. He did become aware that the respondent had not received a written resignation from the claimant. The claimant was still doing his job during his notice. BMC considered the claimant’s resignation to be “a done deal” because the respondent had advertised and filled the role. The claimant’s final date changed a few times. The last Friday was to be the exit interview. Letting the claimant keep his car for extra weeks was not normal. The respondent “paid for the other chap to move down”. It had been two-and-a-half months. The respondent got notice of resignation on 28 August 2007 and acted on it.

It was put to BMC that the claimant had suggested that he had not appreciated what he had done. JM replied: “He was telling people what he had done. I don’t understand why he feels he had not resigned.”

BMC stated to the Tribunal that he had heard that “a chap had asked to transfer down” and that he had known that the abovementioned AF was coming for another man (LOM) whose wife was pregnant. The respondent signed off on the expenses.

BMC told the Tribunal that the respondent had launched customer service development at the end of September 2007. At that time the respondent knew that it needed other teams. On 8 October

2007 it was learned that the respondent “resolved to do more with less”. For sales this meant a twenty-five per cent cut in numbers. 7 November was the date that the respondent “started consultations with colleagues”. In mid-December the respondent made appointments. In late January the respondent was “up and running with a new system”.

On 6 November JM met group management. BMC was off-site on 7 November. On 8 November BMC saw a fax from the claimant and gave him a call. BMC saw the fax before the claimant’s e-mail.

BMC told the Tribunal that, about two-and-a-half months after the claimant’s verbal resignation, the respondent heard from the claimant a few hours after mention of redundancies.

BMC rang the claimant and said that he had got the fax. The claimant said that he wanted to withdraw his resignation. The claimant was quite angry. BMC told the claimant that the respondent could not accept his withdrawal. The claimant asked him to confirm in writing and he did so. BMC did not consider letting the claimant withdraw his resignation.

Asked if an employee could withdraw a resignation, BMC replied: “We look at it case by case and we have done so.” Asked if there were no special features in the claimant’s case, BMC replied: “He had been working his notice for two-and-a-half months. He had not acted on the spur of the moment.”

BMC added: “This was not a set-up to deprive him of redundancy. We had worked with him. There were no problems with him as an employee. There was no disciplinary problem. His area (sales) was performing well. No attempt was being made to get him out to save money.”

Under cross-examination, BMC agreed that in June a customer service development issue had come up and said that it had been a discussion about how the respondent did a sales call but that “it did not necessarily mean changes”. BMC added that the respondent had given new tasks to salespeople. Asked if change had been in the air, BMC replied: “About calls.”

BMC confirmed that the message about doing “more with less” had come from the CEO but did not agree that this meant possible redundancies or new posts. BMC added that what the respondent did with calls was being assessed.

BMC told the Tribunal that he had been surprised at the claimant’s resignation (which he had heard of after lunch on 28 August 2007) because the claimant “had been a big part of our Great Place to Work project” and that he had given the claimant some post-interview feedback.

Asked to agree that the respondent set the policy and that the respondent had to accept it, BMC did agree but said that he did not make a distinction between verbal and written resignation. He referred the Tribunal to the respondent’s notice of appearance which contended that the claimant had given confirmation of his resignation.

Asked why it was that (on the Notice of Resignation) employees were asked to consider their resignation decision carefully if a resignation was already done, BMC replied that the claimant had worked with the respondent on the planning of the claimant’s last date. BMC acknowledged that there had been a delay and that this had been a concern in that the claimant should have written to the respondent, in accordance with the respondent’s policy, and did not.

When it was put to BMC that resignation was not final until confirmed in writing BMC disagreed and said that a verbal resignation was accepted from people who were “out in the field”.

When it was again put to BMC that resignation was not confirmed until the respondent got it in writing BMC replied that it could be confirmed and followed up in writing.

It was put to BMC that the claimant was told that he had no future in the respondent. BMC rejected this but did say that previously the claimant had been counselled on his people-management skills.

Asked if the claimant would have been a candidate for a business development manager role, BMC replied: “He would have had a tough challenge. He could have applied. Whether he would be a candidate is another question.”

BMC told the Tribunal that the respondent had met on 15 October 2007 to see what the changes would be. BMC also said that the claimant had been doing a good job and had been bringing in the Xmas orders early.

It was now put to BMC that information had been withheld from the claimant even though the claimant was bringing in orders. BMC replied: “He had resigned and agreed to move his last date out by two weeks.”

BMC, disagreeing that the respondent had withheld information from the claimant, said: “On 6 and 7 November we moved to restructure. In mid-October we started planning for that.”

Asked why not let the claimant withdraw his resignation, BMC replied: “He had resigned. We have policies which we follow. If somebody resigns in the heat of the moment we let them withdraw. He (the claimant) had resigned a few months earlier. On 8 November 2007 we did not consider letting him withdraw his resignation.”

It was put to BMC that to have let the claimant claim redundancy could have cost the respondent money. BMC replied that the respondent had redundancy in the pipeline but that the claimant had resigned and was working his notice.

When it was put to BMC that nobody had got the claimant’s post BMC replied that the respondent had got somebody but that he did not move down (to the southeast) because it was less disruptive to have EB there rather than AF moving down with his family. BMC told the Tribunal that he did not know if EB or AF had met the claimant’s customers.

When it was put to BMC that he had not told the claimant of restructuring nor let him withdraw his resignation because it was not desired to pay the claimant redundancy BMC simply replied that the claimant had resigned.

It was put to BMC that the respondent had known on 28 August 2007 that there would be redundancies. BMC replied: “No. I’m not a liar. We’d not known about restructuring.”

When it was put to BMC that there could have been opportunities for the claimant (within the respondent) BMC replied that the claimant had said that he had wanted to travel. BMC added that the June meeting had been about sales and not about restructuring.



In re-examination BMC said that redundancy had not come up until October 2007.

Questioned by the Tribunal, BMC said that the respondent had permitted AF to move at a cost to the respondent. AF had wanted help with the move. Then there was a vacancy in the Dublin area. AF was due to go down (to the southeast) on 12 November 2007. BMC told the Tribunal that, rather than move AF's family down, the respondent thought that it would have the work done by EB who was more local.

BMC said that 26 January 2008 was the end in that grocery sales executive posts went to grocery business development manager posts. The claimant's post was redundant from 26 January 2008.

Asked what would happen if somebody refused to complete a "Notice of Resignation" form, BMC replied that the respondent liked to get the resignation in writing but that the respondent would not issue disciplinary proceedings. BMC said that such an employee could follow the grievance procedure but that the claimant had not expressed concern about his resignation.

### **Determination:**

Having carefully considered the evidence adduced, the Tribunal is unanimous in finding that it was not unreasonable, after two-and-a-half months, for the respondent not to reconsider the claimant's resignation. There were no special circumstances. This is in view of the claimant's active acquiescence in his resignation. By agreeing to postpone the date of his termination he co-operated with the respondent's plans to replace him. There was too long a gap between his announcement of his resignation and his ultimate attempt to rescind his own decision.

The claim under the Unfair Dismissals Acts, 1977 to 2007, is dismissed.

The Tribunal also dismisses the claims lodged under the Redundancy Payments Acts, 1967 to 2007, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)